Office-Supreme Court, U.S.
FILED
JUL 14 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 202

BURNHAM CHEMICAL COMPANY, a Corporation,
Petitioner,

v.

OSCAR L. CHAPMAN, Secretary of the Interior, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes and Regulations Involved	2
Statement	4
Specification of Errors to be Urged	10
Reasons for Granting the Writ	11
Conclusion	17
Appendix	18

CITATIONS

CASES:

Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U. S. 752	12
Iron Silver Mining Co. v. Reynolds, 124 U. S. 374	15
Knight v. Lane, 228 U. S. 6	16
Lane v. Hogelund, 244 U.S. 174	15
Roberts v. U. S., 176 U. S. 221	15
Sullivan v. Iron Silver Mining Co., 143 U. S. 431	15
U. S. Borax Co., 58 I. D. 426	6, 9, 18
West v. Standard Oil Co., 278 U. S. 200	12, 16
Wilbur v. Krushnic 280 U. S. 306, 50 L. D. 650	6, 15

STATUTES:

Leasing Act of Feb. 25, 1920, Sec. 23 (c. 85, 41 Stat. 447; Sec. 261, Title 30, USCA)	2, 4, 7, 10, 14
Leasing Act of Feb. 25, 1920, Sec. 24 (c. 19, 45 Stat. 1019, Sec. 262, Title 30, USCA)	3, 10, 14, 15
USC, Sec. 1254(1), Title 28	2
USC, Sec. 29 Title 30	6
Act of Dec. 11, 1928 (C. 19, 45 Stat. 1019, Sec. 261, Title 30, USC)	3

MISCELLANEOUS:

U. S. Geological Survey, Bulletin 785-C	5

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Burnham Chemical Company, a Nevada corporation, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above entitled cause on March 6, 1950, affirming the decision of the United States District Court for the District of Columbia.

OPINIONS BELOW.

The opinion of the District Court (R. 113-122) is reported in 81 F. Supp. 911. The opinion of the Court of Appeals (R. 235) is reported in 181 F. 2d 288.

JURISDICTION.

The judgment of the Court of Appeals was entered March 6, 1950. Rehearing was denied April 20, 1950 (R. 237). The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, U. S. Code (Sec. 240(a) of the Judicial Code as amended by the Act of June 25, 1948, c. 646, 62 Stat. 928).

QUESTIONS PRESENTED.

1. Whether, having two concurrent methods of administrative review covering the same issue, it is necessary to pursue and exhaust both methods as a prerequisite to maintaining a proceeding in court with respect thereto; and

2. Whether an order should issue requiring respondents to reinstate petitioner's applications for sodium prospecting permit and for sodium lease, and to consider such applications upon the basis of the controlling statutes and regulations applicable thereto.

STATUTES AND REGULATIONS INVOLVED.

Sec. 23 of the Leasing Act of February 25, 1920, c. 85, 41 Stat. 447, provided:

> "That the Secretary of the Interior is hereby authorized *and directed*, under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium *dissolved in and soluble in water, and accumulated by concentration*, in lands belonging to the United States for a period of not exceeding two years: Provided, That the area to be included in such a permit shall be not exceeding two thousand five hundred and sixty acres of land in reasonably compact form * * *." (Italics added)

By Act of December 11, 1928 (c. 19, 45 Stat. 1019, Section 261, Title 30, U. S. C.) the foregoing section was amended by deleting the italicized words.

Section 24 of the same Act provided:

> "That upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of one of the substances enumerated in section 23 hereof has been discovered by the permittee within the area covered by his permit and that such land is chiefly valuable therefor the permittee shall be entitled to a lease for one-half of the land embraced in the prospecting permit, at a royalty of not less than one-eighth of the amount or value of the production, to be taken and described by legal subdivisions of the public-land surveys, or if the land be not surveyed by survey executed at the cost of the permittee in accordance with the rules and regulations to be prescribed by the Secretary of the Interior. The permittee shall also have the preference right to lease the remainder of the lands embraced within the limits of his permit at a royalty of not less than one-eighth of the amount or value of the production to be fixed by the Secretary of the Interior. Lands known to contain such valuable deposits as are enumerated in section 23 hereof and not covered by permits or leases, except such lands as are situated in said county of San Bernardino, shall be held subject to lease, and may be leased by the Secretary of the Interior through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, and in such areas as he shall fix, not exceeding two thousand five hundred and sixty acres; all leases to be conditioned upon the payment by the lessee of such royalty of not less than one-eighth of the amount or value of the production as may be fixed in the lease, * * * "

By Act of December 11, 1928 (c. 19, 45 Stat. 1019, Sec. 262, Title 30, USC) the foregoing section was amended (to its present form) by changing the royalty and rental rates and deleting the reference to San Bernardino County.

Regulations.

The applicable regulations are set forth at pages 4 et seq. of the Record.

STATEMENT.

This proceeding involves a ten-acre area of Mojave Desert land known as "Little Placer" and located in the Kramer District of Kern County, California.[1] On June 1, 1928, petitioner, Burnham Chemical Company, filed an application for a sodium prospecting permit under section 23 of the Leasing Act of February 25, 1920.[2] Although the area was favorable for prospecting for sodium borates referred to in the Act (R. 186, 230) it was not known whether Little Placer actually contained such deposits (R. 66, 185); nor was it known whether such deposits, if any, were formed by the particular geological process prescribed by Sec. 23, namely, "accumulated by concentration".

A drilling on Little Placer, completed September 2, 1927, to a depth of 907 feet, had disclosed no sodium borates (R. 50, 213). However, in 1927 sodium borates in the form of tincal and kernite[3] had been discovered at "Western" in two drillings, one 110 feet south of Little Placer and the other 206 feet southwest of Little Placer, both at a depth of about 800 feet (R. 31, 46). Also sodium borate (tincal) had been discovered in 1926 at "Suckow", about one mile northwest of Little Placer, at a depth of 350 feet, and in 1925 tincal and in 1926 kernite had been discovered at "Baker" one-half mile northeast of Little Placer at a depth of 400 feet (R. 46, 59, 75). But a hole drilled to a depth of 605 feet half way between Baker and Little Placer had disclosed no sodium borates (R. 213), and numerous other drillings in the vicinity were negative (R. 213, 101). Prior to the discoveries referred to above, all known deposits of sodium

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[1] Technically described as the SW¼ of the SW¼ of the NE¼ of Section 24, Township 11 N., Range 8W, S.B.M.

[2] C. 85, 41 Stat. 447; see Sec. 261, Title 30, USCA.

[3] Kernite, named from "Kern" County where it was first discovered at Baker in 1926, $Na_2B_4O_7$. 4 H_2O is a dehydrated form of tincal $Na_2B_4O_7$. 10 H_2O (R. 64). The only known deposits of kernite in the world are at Baker and Western; and the geological knowledge concerning its characteristics and the source or manner of its deposition were, at that time embryonic (R. 101-2, 40, 75, 78).

borates had been surface deposits of tincal in dried up lake beds.

In 1926 the U. S. Geological Survey published Bulletin No. 785-C referring to this area and stating:

> "The records just given, though incomplete, show that the borate deposits are extremely irregular in form and distribution, being present in the shale at some places and absent at others near by, and that the structure of the Tertiary rocks within which they lie is exceedingly complex. It is evident, therefore, that the occurrence of a borate deposit beneath any given spot in the alluvium that mantles the district is utterly unpredictable, and that the limits of the deposits can be determined only by underground exploration." (Exhibit No. 4, R. 14, 95, 140, 185.)
>
> (See also R. 102, 213, 214, 78, 141, to the same effect.)

Eminent geologists of that day, including Dr. F. L. Ransome, consulting geologist, professor of economic geology, California Institute of Technology, Pasadena, California, Dean Frank H. Probert, Dean of the College of Mining of the University of California, Hoyt S. Gale, the geologist, formerly with the United States Geological Survey, who in 1927 suggested the name "Kernite" for the newly discovered borate (R. 96); Joseph Jensen, geologist and mining engineer, assistant professor of mining at Carnegie Institute of Technology, Pittsburgh, Pa., and Samuel E. Guthrey, mining engineer and mineral inspector for the U. S. Land Office, were of the opinion

> "that it would be impractical to classify any lands in the district as known to contain tincal and kernite without discovery; and that such classification based upon discovery on other lands would not be justified",

inasmuch as the subsurface deposits had only been found in lenses, disconnected and irregular, and without surface indication of the presence thereof (R. 102-5). On June 1, 1928, when petitioner filed its application for sodium prospecting permit it was not known by what process of nature

the sodium borates in either of the three known deposits had been formed.

With knowledge of this factual setting, the then Commissioner of the General Land Office, Department of the Interior, in a ruling letter dated November 23, 1928, determined (1) that Little Placer was known to contain valuable deposits of sodium borates dissolved in and soluble in water, and accumulated by concentration (2) that Little Placer was therefore subject to lease under section 24 of the Leasing Act rather than subject to prospecting permit under section 23 and (3) that petitioner's application for prospecting permit was rejected and such rejection would become final unless petitioner appealed such ruling within 30 days of notice (R. 228).

Meanwhile, on August 1, 1928, United States Borax Company filed an application for issuance to it of a patent on Little Placer under the mining laws [4] (R. 229). Its application was based upon a mining location made in 1926, and upon discovery of colemanite or calcium borate (a mineral covered by the mining laws but not included in the Leasing Act (R. 57)). This location together with the application based thereon was actually void *ab initio* because there was outstanding at the time of location an oil and gas prospecting permit issued to one Ray M. Smith [5] (R. 156; U. S. Borax Co., 58 I.D. 426 at pages 443-444).[6] But because of his failure to note this fact disclosed by his own records, the Commissioner treated the United States Borax Company application as *prima facie* valid (R. 229). It was not until July 31, 1944, that this fact and the resulting invalidity *ab initio* was brought to light (58 I.D. 426, 443).

On August 24, 1928 (R. 202), United States Borax Company protested the prospecting application of Burnham Chemical Company, petitioner herein; and in the same ruling letter of November 23, 1928, referred to above, the

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[4] Sec. 29, Title 30, U.S.C.

[5] This permit issued to Ray M. Smith was cancelled May 10, 1927.

[6] *Wilbur* v. *Krushnic,* 280 U.S. 306, 314; 50 L.D. 650, 651.

Commissioner ordered a contest hearing between petitioner, on its prospecting permit application under section 23 of the Leasing Act and United States Borax Company on its application for patent under the mining laws—both applications covering Little Placer—in order to determine (1) whether Little Placer "is valuable for sodium in any of the forms described in the leasing act of February 25, 1920" and (2) so known at the date of the United States Borax Company's mining location (R. 231). The letter also required the Government to be represented at the contest hearing, which it was, appearing as intervenor (R. 99, 227).

As pointed out above the letter had first stated that Little Placer contained sodium borates and was subject to lease only. Thus the Commissioner, in the same letter, first determined that Little Placer contained sodium borates in the forms described in Sec. 23 of the Act and then ordered a contest proceeding to redetermine that very fact (R. 227, 228, 231).

Petitioner was thereby presented in the same ruling-letter with two concurrent procedural avenues for administrative determination of the same basically controlling factor, namely, whether Little Placer was "known to contain" valuable deposits of sodium in any of the forms described in section 23 of the Leasing Act of February 25, 1920; one avenue being to appeal the rejection of the application for prospecting permit, and the other being to prosecute the contest proceeding raised by the U. S. Borax Co. protest.

On January 14, 1929, petitioner filed an application for lease of Little Placer under Section 24 of the Leasing Act of February 25, 1920 (R. 232), but did not appeal that portion of the Commissioner's determination denying the application for prospecting permit. This lease application was incorporated as an issue in the contest proceeding along with petitioner's application for prospecting permit.

Hearing on the contest lasting 30 days was had before the Land Office Register at Los Angeles in June and July, 1929, Burnham Chemical Company being required to carry the

burden of proof. The decision of the Register was announced February 12, 1931 holding that Little Placer was not known to contain sodium in any of the forms described in the leasing act and that a patent should issue to the U. S. Borax Company. Petitioner appealed and the Commissioner of the General Land Office affirmed the decision April 21, 1932, stating:

> "045676 is held for rejection subject to contestant's right to appeal to the Secretary of the Interior within 30 days from notice" (R. 215).

045676 was petitioner's prospecting permit application covering Little Placer. (R. 206).

Petitioner duly appealed to the Secretary of the Interior who, on March 8, 1933, affirmed the decisions of the Register and Commissioner, *finally denied petitioner's respective applications for prospecting permit* and for lease on Little Placer, and ordered the patent to issue to U. S. Borax Company (R. 97, 51-52).*

In 1935 the Solicitor of the Department of the Interior recommended further investigation of United States Borax Company's claims to Little Placer, (the patent although ordered to be issued, not actually having issued) with a view toward reopening the prior contest proceeding (R. 225). As a result of that investigation the Secretary of the Interior, on May 19, 1937, instigated administrative proceedings to reopen the issue determined in the prior contest (R. 30, 54). This proceeding, however, was brought against the Borax Company only, without notice to petitioner and without reinstating petitioner as an interested party, despite petitioner's repeated requests for reinstatement.

Respondent, Commissioner Fred Johnson, held on November 21, 1941, that the Borax Company entry on Little

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* The Secretary said: "The Commissioner accordingly affirmed the register's decision and held the *permit application* of the Burnham Chemical Company for rejection, from which holding Burnham Chemical Company has appealed." 54 I. D. 183 at p. 185. (Italics added).

Placer was subject to cancellation. This decision was affirmed on appeal to the Secretary, in April, 1943; and on July 31, 1944, respondent Oscar L. Chapman denied motions for rehearing and reopening (R. 98) stating among other reasons that because of the existence of an oil and gas prospecting permit on Little Placer at the time of the Borax Company's attempted location thereon (which oil and gas prospecting permit was subsequently cancelled (R. 156)) the Little Placer claim of the Borax Company "was void from its inception" (58 I.D. 426, at p. 444).

Respondents then brought suit in the United States District Court for the Northern District of California against United States Borax Company and on August 16, 1945, a final decree was entered therein perpetually enjoining United States Borax Company from asserting or acquiring any interest in or claim to Little Placer by patent, purchase, lease or otherwise and requiring the execution of a quit claim deed thereto to the United States (R. 68).

Meanwhile, immediately upon hearing of the reopening of the determination arrived at in petitioner's contest with the Borax Company, petitioner on October 15, 1937, filed with respondents an application for reinstatement of its applications for prospecting permit and sodium lease on Little Placer (R. 97, 180). No action having been taken thereon, petitioner on May 11, 1939, requested that action be taken (R. 97). On September 18, 1945, petitioner again requested action on its application (R. 98). On June 18, 1946, respondents rejected petitioner's application for reinstatement of its applications for prospecting permit and lease (R. 98). Petitioner's appeal to the Secretary was rejected January 22, 1947, and petitioner's petition for rehearing was rejected February 24, 1947 (R. 98), respondent Chapman stating that by failing to appeal in 1928, petitioner had acquiesced in the rejection of its application for prospecting permit (R. 111). On April 14, 1947, this suit was filed.

The trial court held (1) that petitioner is precluded from maintaining this proceeding with respect to its application

for prospecting permit because it had failed to exhaust its administrative remedy with respect thereto (R. 114),[7] and (2) that petitioner is not entitled to a prospecting permit because no reason appears for setting aside the action of the Secretary in holding that the lands are subject to disposition by lease under section 24 of the Leasing Act rather than by prospecting permit under section 23 (R. 122); and (3) that petitioner is not entitled to a lease because the right to issue leases is confided in the Secretary's discretion and is not mandatory (R. 122).

The Court of Appeals affirmed the decision below *per curiam*, adopting the trial court's opinion by reference thereto (R. 235).

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In holding that petitioner is precluded from maintaining this action "by failure to exhaust its administrative remedies".
2. In holding that respondents and their respective predecessors in office did not err either in law or in the exercise of their discretion in holding that Little Placer, in 1928, was "known to contain valuable deposits" of sodium borates accumulated by concentration, within the meaning of section 24 of the Leasing Act of February 25, 1920.
3. In holding that respondents did not abuse their discretion when, having reopened the prior contest proceeding as to United States Borax Company, they refused to reopen said proceeding as to petitioner and refused to reinstate petitioner's applications, covering Little Placer.

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[7] The court said: "The proceeding terminated insofar as the plaintiff's application for a prospecting permit was concerned, on February 9, 1929, by denial of plaintiff's application." (R. 114)

4. In holding that petitioner's application for lease of Little Placer should be administered in accordance with the respondents' regulations adopted in 1935 (requiring competitive bidding) rather than in accordance with respondents' regulations in effect at the time of filing petitioner's application for lease in 1929 (which regulations did not require competitive bidding).

5. In failing to hold that after the interest and claims of United States Borax Co. had been finally determined to be void *ab initio,* petitioner's applications should be reconsidered by respondents on the same basis as they would have been considered in 1928 and 1929, respectively, had such determination been made at the time of the filing of petitioner's applications.

REASONS FOR GRANTING THE WRIT.

1. (a) The statutory provisions herein involved have not previously been construed by this Court. (b) The questions are of general importance because they affect the future discovery and development of borax deposits in the area from which more than 97 per cent of the world's supply of borax is now being mined, and the administration of the statute applicable thereto. (c) It is unlikely that a conflict between circuits will ever arise, because the cause of action grows out of administrative determinations and interpretations of law made, and which by their nature will continue to be made, in the District of Columbia.

2. This case presents an important question of administrative law, namely, whether having two concurrent methods of administrative review covering the same issue, it is necessary to pursue and exhaust both methods as a prerequisite to maintaining a proceeding in court with respect thereto.

The rule is well settled that failure to exhaust an available administrative remedy normally precludes judicial relief

from an administrative determination.[8] Petitioner, in the present case, was presented in the same notice and ruling letter with two concurrent avenues or methods for administrative appeal of the same issue, namely, whether its application for prospecting permit should be granted (R. 231). It did not appeal the determination denying the application. Instead (1) it filed an application for a lease and (2) it attacked that determination in the contest proceeding against U. S. Borax Co., the government appearing therein as intervenor (R. 227, 99, 51). The application for lease was then consolidated as an issue in the contest proceeding (R. 99). The only ultimate issues decided in that contest, so far as petitioner was concerned, were whether its applications for prospecting permit (045676) and for lease would be granted or rejected; and the order with respect to petitioner issued therein by the Commissioner was "045676 is held for rejection subject to contestant's right of appeal to the Secretary of the Interior within 30 days from notice." (R. 215.) Petitioner duly appealed to the Secretary (R. 97) and the Secretary affirmed the Commissioner's decision on March 8, 1933. Petitioner not only exhausted its administrative remedy but after the Secretary reopened his determination it promptly applied for administrative reinstatement on October 15, 1937 (R. 97, 180), on May 11, 1939 (R. 97), on Sept. 18, 1945 (R. 98), and February 17, 1947 (R. 98).

Although the Commissioner rejected petitioner's application for permit on February 9, 1929 (R. 99), he subsequently specifically recognized the pendency of that application in his order of April 21, 1932 (R. 206), and the Secretary did likewise in his affirmance on March 8, 1933 (54 I.D. 183). Such continuing consideration of petitioner's application was in effect a reconsideration of the prior administrative rejection thereof in February, 1929, which reconsideration was well within his power. *West* v. *Standard Oil Co.*, 278 U. S. 200, 210, 214.

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[8] Cf. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 774.

The respondent Secretary (R. 111), the trial court (R. 116, 114), and the Court of Appeals (R. 235) each held that petitioner had not exhausted its administrative remedy with respect to its prospecting permit. We respectfully suggest that such holding was in error.

3. This case presents an important question of the administration of Congressional policy embodied in the Leasing Act of February 25, 1920. The announced policy is to encourage discoveries of sodium borates on public lands, and the leasing of such lands, thus providing royalty revenues therefrom (R. 13-14, 95). Respondents' continuing administrative refusal to grant sodium prospecting permits upon public lands favorable for such prospecting but not actually known to contain such deposits tends to discourage prospecting, development and leasing (R. 77) and encourages circumvention of the Act (R. 80). Prospectors in this area, being cognizant of the 22 years of struggle to which petitioner has been subjected, are loath to proceed under the Leasing Act. It is much easier, less expensive and less hazardous for prospectors to proceed under the mining laws. Those who have done so have acquired patent to about 828 acres of sodium borate lands in Sections 24 and 18 (R. 31, 207, 215-218) resulting in the loss of past and future public revenues running into millions of dollars.[9]

The subsurface deposits of sodium borates in the Kramer District (which includes Little Placer) are without surface indication, and are extremely irregular in form and distribution, being present in some places and absent at others nearby. The occurrence of sodium borates beneath any given spot is "utterly unpredictable", and the limits of a deposit can be determined only by underground exploration (R. 14, Ex. 4, R. 102, 213, 214, 78, 141). There is no evidence in the record to the contrary. In this respect these deposits differ from coal, oil, salt and phosphate lands (R. 102). A drill hole 907 feet deep on Little Placer drilled in

[9] See appendix, *infra* p. 18.

1927 failed to disclose the presence of sodium borates. This hole was 100 feet deeper than any known deposit.

Section 24 of the Leasing Act provided that "Lands known to contain valuable deposits" of sodium borates "shall be subject to lease", etc.

Respondents classified Little Placer as "known to contain" sodium borates, and therefore, subject to lease under section 24 rather than classifying it as subject to prospecting permit under section 23. In doing so they

(1) assumed that the statute meant "believed to contain" valuable deposits of sodium borates (R. 58) rather than "known to contain"; (2) failed and refused to recognize the uncontradicted evidence replete in the record to the effect that sodium borate deposits in this area unlike those of other minerals (R. 102) are irregular, sporadic, utterly unpredictable, and can be determined only by underground exploration; and (3) failed to recognize that the requisite fact of whether such deposits, if any, were "accumulated by concentration" could only be determined by a study of subsurface geological conditions actually existing at the location of the deposits.

Only by subsurface prospecting, by drilling and gathering actual information, could such factors be determined.

On June 1, 1928, when petitioner filed its application for a sodium prospecting permit it was not known by what process of nature the sodium borate in the three known deposits was formed. Much less could it be known, how the suspected deposits on Little Placer were formed, if indeed, they were there at all. The question as to whether they were or were not "accumulated by concentration" had not been determined; they hadn't even been found. Congress in effect placed upon the prospector the duty of determining a peculiarly technical fact which was not easy to prove (R. 55) without access to the deposit and without a thorough study of the physical and geological facts. Therefore, Con-

gress directed the Secretary of the Interior to issue a prospecting permit so that the prospector could get those facts and present them to the Secretary.

Respondents acted upon the basis of belief rather than knowledge. There is a wide difference between mere belief and knowledge. *Iron Silver Mining Co.* v. *Reynolds,* 124 U.S. 374, 384; *Sullivan* v. *Iron Silver Mining Co.,* 143 U.S. 431, 442. Where the Secretary of the Interior interprets and applies a statute in a way contrary to its explicit terms, he departs from plain official duty, and the error may be corrected by writ of mandamus directing disposal of the application on its merits, such further proceedings to be in conformity with the proper interpretation of the statute. *Wilbur* v. *Krushnic,* 280 U. S. 306, 319; *Roberts* v. *U.S.,* 176 U.S. 221, 231; *Lane* v. *Hogelund,* 244 U.S. 174, 181.

At the time of filing its application on June 1, 1928 the Secretary was "authorized and directed" by sec. 23 of the Leasing Act "under such rules and regulations as he may prescribe, to grant any qualified applicant a prospecting permit." Petitioner fully conformed to the rules and regulations and was in all respects a "qualified applicant." There were at the time no valid outstanding conflicting claims. If the meaning of the statute is in accordance with its explicit terms petitioner is entitled to the issuance of a prospecting permit as a ministerial act; and respondents' failure to perform such act is subject to judicial correction. *Wilbur* v. *Krushnic, supra.*

4. Section 24 of the Leasing Act (Sec. 262, Title 30, USCA) has from the date of its enactment, specifically provided for issuance, by the Secretary, of sodium leases "through advertisement, competitive bidding, or such other methods as he may by general regulations adopt" etc. The regulations, adopted pursuant to and in conformity with statute, had the force and effect of law. Those regulations, prior to amendment in 1935, had no provision for competitive bidding for leases (R. 95). Respondents' prede-

cessors in office recognized petitioner and one J. C. McMillan as the only persons who would be entitled to a lease of Little Placer in the event U. S. Borax Co. was not entitled to a patent. This is implicit in the contest proceeding involving those three claimants (R. 99) for it would be an idle thing to hold a contest proceeding lasting 30 days to determine the claimant entitled to a lease, and then to deny the lease to the prevailing contestant upon the ground that he must publicly bid therefor against his erstwhile opponents and the rest of the world. Such a contest proceeding would be pointless. No other claimants appeared with respect to Little Placer (R. 99). J. C. McMillan submitted no evidence (R. 208) and failed to appeal (R. 215) or otherwise exhaust his administrative remedy. The claim of U. S. Borax Co. was ultimately declared void *ab initio*. This left petitioner as the only claimant lawfully authorized under the regulations to receive a lease. But respondents, upon reopening as against U. S. Borax Co., the determination arrived at in the contest proceeding, refused to reopen the same determination with respect to petitioner. Respondents clearly had the power to reopen the issue as to petitioner, Little Placer still being in the public domain. *West* v. *Standard Oil Co.*, 278 U.S. 200, 212; *Knight* v. *Lane*, 228 U.S. 6, 13. It was only because of the prior error of the Commissioner and Secretary that the invalidity *ab initio* of the claim of U. S. Borax Co. had not been noticed; and because of that error, that petitioner's application for lease had not been granted.[10] If, as stated in *West* v. *Standard Oil Co., supra,* at p. 220, the Secretary is "the supervising agent of the Government to do justice to all claimants" it was incumbent upon him to reopen the prior determination with respect to petitioner as well as with respect to U. S.

[10] Petitioner, being the first claimant to file upon the land, was entitled to priority (R. 161, 165). U. S. Borax Company's first Federal filing was August 1, 1928, two months after petitioner filed. Its prior location was not a matter of Federal record. McMillan, who filed in December 1928, did not appeal.

Borax Co., and to act upon petitioner's lease application in accordance with the statute and the regulations (having the effect of law) in effect at the time of the filing of petitioner's application for lease. His failure to perform his obligation to do justice is an abuse of discretion.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be granted.

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APPENDIX.

1. Petitioner's application for lease covered also the south half of section 24 (R. 232). The Western Borax Co. had located the south half of sec. 24 in 1926 (R. 73, 76) but that location was void *ab initio* because the prior Smith prospecting permit covering the south half of sec. 24 (as well as Little Placer) was outstanding (*U. S. Borax Co.*, 58 I.D. 426, 443-444, and note 4). This south half of sec. 24 was known to contain sodium borates in 1928 because tincal and kernite had actually been discovered thereon (R. 101). Instead of leasing said lands to petitioner in conformity with the Leasing Act as amended on December 11, 1928, and the regulations applicable thereto, respondents' predecessors in office issued patents thereon to Western Borax Company based upon the void locations.

The Baker locations were also located on the area covered by the Smith oil prospecting permit. Hence, those locations were void also. Ninety-seven per cent of the world's production of borax comes from within a diameter of 75 miles from Little Placer. By issuing patents on these properties at Baker and Western instead of leasing them, millions of dollars in royalties have been lost to the public revenues.

Similarly, the policy of refusing prospecting permits because of the existence of known deposits on adjoining areas has deterred sodium prospecting, for such areas can now be explored only by first taking out a lease, by competitive bidding,—a procedure involving substantial financial commitments which, due to the peculiar nature and uncertainty of deposits, may prove highly unprofitable.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	7
Conclusion	10

CITATIONS

Statutes:

Act of March 3, 1879, sec. 1, 20 Stat. 394, 43 U.S.C. 31	8
Mineral Leasing Act approved February 25, 1920, sec. 23, 41 Stat. 447:	
Sec. 23	2, 4, 6, 7
Sec. 24	4, 7, 8, 10
Mineral Leasing Act as amended December 11, 1928, 45 Stat. 1019, 30 U.S.C. 261, 262:	
Sec. 23	2
Sec. 24	3

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 202

BURNHAM CHEMICAL COMPANY, A CORPORATION,
PETITIONER

v.

OSCAR L. CHAPMAN, SECRETARY OF THE INTERIOR,
ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 113-116) is reported in 81 F. Supp. 911. The opinion of the Court of Appeals (R. 235) is reported in 181 F. 2d 288.

JURISDICTION

The judgment of the Court of Appeals was entered March 6, 1950 (R. 236). A petition for rehearing was denied April 20, 1950 (R. 237). The petition for writ of certiorari was filed July 14,

1950. The jurisdiction of this Court is invoked under 28 U. S. C. sec. 1254(1).

QUESTION PRESENTED

Whether a suit to compel issuance of a permit to prospect for sodium, pursuant to section 23 of the Mineral Leasing Act, which is grounded on an allegation that the permit had been arbitrarily denied may be maintained where (a) the permit had been refused by the Commissioner of the General Land Office because the Geological Survey had found that the mineral content of the land made section 23 inapplicable and (b) the applicant did not appeal to the Secretary of the Interior from the Commissioner's action.

STATUTES INVOLVED

Section 23 of the Mineral Leasing Act approved February 25, 1920, 41 Stat. 447, provided:

> That the Secretary of the Interior is hereby authorized *and directed,* under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium *dissolved in and soluble in water, and accumulated by concentration,* in lands belonging to the United States for a period of not exceeding two years: * * *. [Italics added.] [1]

[1] The italicized words were deleted by the Act of December 11, 1928, 45 Stat. 1019. In its present form, sec. 23 is 30. U.S.C. 261.

Section 24 of the Act as amended December 11, 1928, 45 Stat. 1019, 30 U. S. C. 262, provides: [2]

> That upon showing to the satisfaction of the Secretary of the Interior that valuable deposits of one of the substances enumerated in section 23 hereof have been discovered by the permittee within the area covered by his permit and that such land is chiefly valuable therefor, the permittee shall be entitled to a lease * * *. * * * Lands known to contain valuable deposits of one of the substances enumerated in section 23 hereof and not covered by permits or leases shall be subject to lease by the Secretary of the Interior through advertisement, competitive bidding, or such other methods as he may by general regulations adopt and in such areas as he shall fix, not exceeding two thousand five hundred and sixty acres. * * *

STATEMENT

Petitioner brought this suit to compel respondents to grant it a sodium prospecting permit and a sodium lease for the "Little Placer," a 10-acre tract in Sec. 24, T. 11 N., R. 8 W., S. B. M. (R. 2-28). According to the complaint, the permit and lease were denied arbitrarily by respondents' predecessors (R. 24-27). The District Court dismissed the complaint (R. 122) and the Court of Appeals affirmed (R. 236).

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[2] So far as this case is concerned, the amendments did not change the meaning or effect of sec. 24.

The facts are as follows:

In June 1928, petitioner filed with the Register at Los Angeles, California an application to the Commissioner of the General Land Office for a sodium prospecting permit on certain lands in Kern County, California. Among the lands included in the application was the Little Placer (R. 193-198).

The application was made pursuant to section 23 of the Mineral Leasing Act approved February 25, 1920, 41 Stat. 447, which as it then stood directed the Secretary of the Interior "to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for * * * sodium dissolved in and soluble in water, and accumulated by concentration, in lands belonging to the United States * * *." However, section 24 of the Act provided that: "Lands known to contain such valuable deposits as are enumerated in section 23 hereof and not covered by permits or leases * * * shall be held subject to lease * * *."

Under date of November 23, 1928, the Commissioner of the General Land Office notified the Register that (R. 229): "On October 25, 1928, the Geological Survey reported that the lands in Sec. 24, T. 11 N., R. 8 W., contain sodium salts in commercial quantities and are subject to entry only under lease." The Commissioner concluded (R. 231-232): "You will notify the Burnham Chemical

Company that inasmuch as the Survey has reported the land in Sec. 24, T. 11 N., R. 8 W., as subject to lease only, its application for prospecting permit is hereby denied as to said section, subject to appeal within 30 days from notice, in default of which the application will be rejected to that extent without further notice from this office."

In the same letter the Commissioner directed that a hearing be held by the Register between petitioner and the United States Borax Company, which had made an entry on the Little Placer under the mining laws (R. 231). Petitioner had protested the entry on the ground that the Little Placer was subject to disposition only under the Mineral Leasing Act (R. 200-201). The Borax Company had protested petitioner's application on the ground it had located the land as a placer mining claim and it did not contain minerals enumerated in that Act (R. 202-204).

Under date of December 14, 1928, the Register notified petitioner of the Commissioner's decision and of its right to appeal to the Secretary of the Interior (R. 227). Petitioner did not appeal from the denial of its application and the rejection became final on February 9, 1929 (R. 118). However, on January 16, 1929, petitioner applied for a sodium lease on the Little Placer, stating that the "land is valuable for sodium and subject to sodium lease as set forth in the Commissioner's letter of November 23, 1928 * * *" (R. 119, 233).

As a result of the hearing directed by the Commissioner, the Register recommended rejection of the lease application and granting of the patent (R. 99-109). The Commissioner affirmed the recommendation of the Register (R. 206-215) and on March 8, 1933, the Commissioner's action was affirmed by the Secretary of the Interior. 54 I. D. 183. In effect, the Secretary found that any sodium that might be found in the Little Placer had not been "accumulated by concentration" and so was not a mineral enumerated in the Mineral Leasing Act.

But on May 19, 1937, before the Borax Company received a patent, the Secretary directed the institution of adverse proceedings against its entry (R. 120) and, on April 28, 1943, found that before the company perfected its mining location the land was known to contain valuable deposits of sodium borates "accumulated by concentration." 58 I. D. 426. Accordingly, he ordered cancellation of the entry (R. 120-121).

After institution of the adverse proceedings, petitioner applied for reinstatement of its permit and lease applications (R. 120). When the application was rejected (R. 121), it brought this suit.

The grounds on which the trial court dismissed the suit (R. 113-116) may be summarized as follows:

Section 23 required the Secretary of the Interior to grant a prospecting permit to a qualified appli-

cant if the lands applied for came within that section. But section 24 provided that lands known to contain valuable deposits of any mineral enumerated in section 23 should be leased. In order to give effect to both sections, it must be held that the Secretary was not required to issue permits to prospect for a mineral which the land is known to contain. The Commissioner's decision that the Little Placer was known to contain sodium was neither arbitrary nor capricious. Moreover, by failing to appeal from that decision, petitioner failed to exhaust its administrative remedies. Since the Secretary is not required by section 24 to grant lease applications, the court cannot compel him to grant that of petitioner.

The Court of Appeals affirmed *per curiam,* stating (R. 235) that "The opinion of the district judge * * * seems to us to demonstrate the soundness of his conclusion."

ARGUMENT

As was held below, section 23 of the Mineral Leasing Act, which at the time of petitioner's application required the Secretary of the Interior to grant any qualified applicant a permit to prospect for sodium, comprehended only land whose mineral character was unknown. For when land is already known to contain valuable mineral deposits, it would be idle to permit "prospecting" for such minerals and unjust to accord a permittee the preferential rights which would ensue upon his "dis-

covery" thereof. As section 24 provides, that land is to be leased at the discretion of the Secretary.

By this suit petitioner sought to compel respondents to grant it a permit to prospect for sodium on the ground that their predecessors had arbitrarily denied its application therefor. But since the Commissioner had denied the permit because the Geological Survey reported that the land contained sodium in commercial quantities, the trial and appellate courts found petitioner's allegations without basis (p. 7 *supra*). For the law long since committed to the Director of the Geological Survey the "classification of the public lands and examination of the Geological Structure, mineral resources and products of the national domain." Sec. 1, Act of March 3, 1879, 20 Stat. 394, 43 U. S. C. 31. Obviously, action based on information from this source was not arbitrary or capricious.[3]

Moreover, as the courts below held, petitioner was barred from bringing this suit because it failed to exhaust its administrative remedies. Petitioner gives no reason why it failed to appeal within 30 days "in default of which" its application would be summarily rejected. No concurrent method of review was suggested. Accordingly, there is no

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[3] Petitioner's contention (Pet. 13-15) that the presence of sodium could have been disclosed only by prospecting is refuted by the Secretary's finding (R. 120-121), which is highlighted by petitioner's persistent efforts to obtain the Little Placer, that the report of the Geological Survey was entirely accurate.

substance to the contention (Pet. 11-13) that in fact it did appeal by applying for a lease and by participating in the hearing on the mining claim of the United States Borax Company. Since petitioner's lease application stated that the Little Placer contained valuable deposits of sodium, it conceded that a permit to prospect for that mineral could not be granted. Therefore, the filing of the application for a lease was not an appeal from the denial of the application for a permit. Neither was petitioner's participation in the Borax Company hearing. Since it could not obtain a lease of the Little Placer unless it successfully resisted the Borax Company's claim to title to that tract, its appearance in that hearing is attributable to its pursuit of the lease application.[4]

Petitioner's final contention (Pet. 15-17) that when the Secretary held invalid the mining entry of the Borax Company he acted arbitrarily in refusing it a lease unless it bid more than its competitors is equally unsubstantial. Possibly there

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[4] To support its assertion that in effect it appealed from denial of its permit application, petitioner points out (Pet. 8, 12) that this application was No. 045676 and that the Commissioner's decision affirming the Register stated (R. 215) that "045676 is held for rejection subject to contestant's right of appeal to the Secretary of the Interior within 30 days from notice." The want of substance in the assertion appears from the sentence that immediately follows: "Advise the parties hereof, and that if no appeal is filed within the time allowed, this decision will become final, *lease* application 045676 of Burnham Chemical Company will be rejected and the case will be closed without further notice." (Italics added).

would be some basis for the contention if, had the mining entry been invalidated in the hearing in which petitioner participated, it would have obtained a lease. But Section 24 did not require the Secretary, even though he held the entry invalid, to grant a lease, and petitioner concedes (Pet. 16) there is nothing in the record to show that at that time the Secretary had undertaken to grant a lease to petitioner. In the absence of such a commitment, the later refusal of the Secretary to exempt petitioner from the hazards of competitive bidding was quite correct.

CONCLUSION

The decision below is correct, and the case does not warrant review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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AUGUST, 1950.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1950 899018 70

Office Supreme Court
FILED
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CHARLES ELMORE

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PETITIONER'S REPLY BRIEF.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
I. Petitioner Did Appeal the Rejection of Its Permit Application	1
II. Petitioner Did Not Concede That Little Placer Was Known to Contain Sodium Borates	3
III. The Permit Application Rejection Was Not Premised Upon the Geological Survey Report	4
IV. If the Doctrine of Geological Inference Is Not Applicable, Petitioner Is Entitled to a Permit; If It Is Applicable, Petitioner Is Entitled to a Lease	5
Conclusion	6

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PETITIONER'S REPLY BRIEF.

I.

Petitioner Did Appeal the Rejection of Its Permit Application.

Respondents state (a) that petitioner's application for prospecting permit was finally rejected February 9, 1929 (br. p. 5); (b) that because petitioner did not appeal the notice of rejection, it failed to exhaust its administrative remedy with respect thereto (br. p. 8); (c) that the subsequent contest proceeding with the Borax Company did not involve a reconsideration or redetermination with respect to petitioner's permit application (br. p. 9); and (d) that petitioner's contention that it did appeal the

rejection of its permit application as a part of its contest appeal is without substance (br. pp. 8-9).

Inasmuch as the foregoing contention formed the ground for defendant Chapman's final rejection of petitioner's application for reinstatement of its prospecting permit application in 1947 (R 110-111), and inasmuch as the trial court in the present proceeding also adopted this view (R. 116), petitioner respectfully calls attention to the following facts:

(1) The letter of the Commissioner of the General Land Office, dated November 23, 1928, ordered a contest proceeding between petitioner on its "application 045676 for a sodium prospecting permit" (R. 228, 231) and United States Borax Company on its mineral application.

This was more than seven weeks before petitioner's lease application was filed (R. 96). Obviously, the contest involved the *permit* application.

(2) The Register's decision on the contest, which decision was dated February 12, 1931, begins with these words (R. 99):

> "Burnham Chemical Co. v. United States Borax Co. * * *, United States Intervenor.
>
> "Involving sodium prospecting permit 045676, sodium lease application 046681 * * *"

045676 was petitioner's prospecting permit application. 046681 was petitioner's lease application. Obviously, the contest involved the *permit* application.

(3) The Commissioner's decision dated April 21, 1932 (R. 206), lists petitioner's permit application 045676 and its lease application 046681. The first words of the decision are: "Reference is made to sodium prospecting permit application 045676 * * *."

The opinion states (R. 215) "045676 is held for rejection subject to contestant's right to appeal to the Secretary of

the Interior within 30 days from notice." 045676 was petitioner's *permit* application.

(4) The Secretary, on appeal decided March 8, 1933, stated " * * * the register * * * recommended rejection of the *applications* of the Burnham Chemical Company"; also "The Commissioner accordingly affirmed the register's decision and held the *permit* application of the Burnham Chemical Company for rejection, from which holding Burnham Chemical Company has appealed." 54 I. D. 183, 185 (italics added). The Secretary thus admitted that the appeal involved the *permit* application and he affirmed the Commissioner's decision.

(5) In 1935 the Solicitor of the Interior Department stated that Burnham Chemical Company had filed an application for sodium prospecting permit on Little Placer and had been allowed to prosecute proceedings before the local register with respect thereto (R. 217).

(6) Petitioner's continuous efforts, subsequent to 1935, to obtain reinstatement of its applications are set forth at page 9 of its Petition for Certiorari.

It is evident from the foregoing not only that petitioner did appeal the rejection of its permit application and did exhaust its administrative remedy with respect thereto, but also that the Register, Commissioner and Secretary recognized the contest proceeding as involving the permit application. Is it not equally evident that both respondent Chapman and the trial court erred in holding that petitioner failed to exhaust its administrative remedy?

II.

Petitioner Did Not Concede That Little Placer Was Known to Contain Sodium Borates.

Respondents contend that by filing its application for lease, petitioner conceded that the land contained sodium borates, and therefore, was not subject to prospecting permit (br. p. 9).

In filing its application for lease, petitioner merely adopted an alternative procedure based upon the statement in the Commissioner's letter of November 23, 1928, that Little Placer was known to contain sodium borates (R. 229). Petitioner never conceded that Little Placer was known to contain sodium borates. Its contest proceeding was prosecuted in the alternative, and respondents and their predecessors in office recognized such to be the fact. This is demonstrated by petitioner's continuous prosecution of both its permit application and its lease application in the contest proceeding, and respondents' predecessors' recognition thereof as set forth in paragraph I hereof.

III.

The Permit Application Rejection Was Not Premised Upon the Geological Survey Report.

Respondents contend that the original rejection of petitioner's permit application, being based upon a Geological Survey Classification, was neither arbitrary or capricious, and therefore, cannot be set aside (br. p. 8). The Geological Survey had reported in October 1928 that "The records of the Geological Survey indicate that the lands listed in Section 24 * * * contain sodium salts in commercial quantities and are subject to entry only under lease" (R. 205). The Commissioner in turn stated that the lands "contain sodium salts" and are subject to entry only under lease (R. 229).

Had the report been accepted and a lease been granted pursuant to the regulations, the Commissioner's action undoubtedly would have been neither arbitrary nor capricious, *prima facie*. But he did not rely upon the report and lease the lands. Instead he ordered a contest proceeding to determine the very fact reported by the Geological Survey. After hearing, the Register held, contrary to the Geological Survey report "that borate of sodium had not been discovered, nor could it reasonably be presumed to exist upon" Little Placer (*Burnham Chemical Co.* v. *U. S. Borax Co.*, 54 I. D. 183 at p. 185), and that Little Placer

was not subject either to prospecting permit or to lease. The Commissioner and Secretary both affirmed on appeal. Subsequently, the Secretary reopened the proceeding as to the Borax Company. He determined, solely by geological inference, that Little Placer was known to contain sodium borates; he held the Borax Company location to be void ab initio; and he ousted that claimant. But he refused to reopen the proceeding as to petitioner or to reinstate its applications. Neither respondents' action, nor that of respondents' predecessors, was based upon the report of the Geological Survey but was based solely upon the evidence adduced in the original contest proceeding and in the reopened proceeding.

IV.

If the Doctrine of Geological Inference Is Not Applicable, Petitioner Is Entitled to a Permit; If It Is Applicable, Petitioner Is Entitled to a Lease.

(1) Petitioner filed its prospecting permit application June 1, 1928. There was at that time no other lawful claimant to Little Placer. Unless Little Placer was then known to contain sodium borates "dissolved in and soluble in water, and accumulated by concentration," petitioner was entitled, as of right, to a prospecting permit under Section 23 of the Leasing Act. Although a drilling 907 feet deep had been made on Little Placer, no sodium borates had been discovered thereon. That was 100 feet deeper that any known deposit. Unless the doctrine of geological inference is applicable, Little Placer was not known to contain sodium borates of any kind (R. 34, 58), and petitioner is entitled to a prospecting permit.

(2) Whether the doctrine of geological inference is applicable is an important question in this case. The doctrine has been applied by this Court in relation to oil lands, coal deposits, and other minerals, concerning which geological knowledge and information as to their nature, occurrence and manner of deposition was well known

(R. 34). But in 1928 the geological knowledge and information with respect to tincal and kernite (the sodium borates herein involved) was embryonic. The manner of deposition was unknown and they had been found only in lenses, disconnected and irregular, and without surface indication (R. 102).

(3) On the other hand, if the doctrine of geological inference is applicable, Little Placer was subject to lease. Being the only lawful claimant in January 1929 (except McMillan who neither offered evidence in nor appealed the contest proceeding), petitioner was, and is, entitled to consideration of its lease application under the regulations, promulgated pursuant to specific statutory authorization, then in effect (R. 95). Petitioner has never received that consideration.

CONCLUSION.

Petitioner submits that (1) if the doctrine of geological inference is not applicable, the action of respondents and their predecessors in office, in refusing to grant a sodium prospecting permit was and is arbitrary and capricious; and (2) if that doctrine is applicable, the action of respondents and their predecessors in office in failing and refusing to consider petitioner's lease application under the statute and regulations in effect at the time of the filing thereof was and is arbitrary and capricious.

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